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Supreme Court, U.S.
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No. 04-295

In The
Supreme Court of the United States

STATE OF FLORIDA,

Petitioner,

v.

TRACI ANN GROSVENOR,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Florida

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Supreme Court of Florida correctly applied the "prejudice" prong of *Strickland v. Washington*, 466 U.S. 668 (1984), *Hill v. Lockhart*, 474 U.S. 52, 59 (1985) and *Roe v. Flores-Ortega*, 528 U.S. 470, 486 (2000) in this post-conviction proceeding.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
OPINION BELOW	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	3
ARGUMENT	4
CONCLUSION	8

TABLE OF AUTHORITIES

Page

CASES

Boykin v. Alabama, 395 U.S. 238 (1969) 4

Grosvenor v. State, 874 So.2d 1176, *rehearing denied*, 2004 Fla. LEXIS 947 (Fla Mar. 26, 2004) 1, 2, 3, 8

Grosvenor v. State, 816 So.2d 822 (Fla. 5th DCA 2002) 1

Hill v. Lockhart, 474 U.S. 52 (1985) ..... i, 3, 4, 5, 6, 7

Holmes v. United States, 876 F.2d 1545 (11th Cir. 1989) 7

Iaea v. Sunn, 800 F.2d 861 (9th Cir. 1986) 7

Johnson v. Zerbst, 304 U.S. 458 (1938) 4

Jones v. Barnes, 463 U.S. 745 (1983) 4

Miller v. Champion, 262 F.3d 1066 (10th Cir. 2001) 6, 7

Powell v. Alabama, 287 U.S. 45 (1932) 4

Roe v. Flores-Ortega, 528 U.S. 470 (2000) ..... i, 3, 5

Strickland v. Washington, 466 U.S. 668 (1984) ... i, 3, 4, 5, 8

United States v. Giardino, 797 F.2d 30 (1st Cir. 1986) 7

Warner v. United States, 975 F.2d 1207 (6th Cir. 1992) 7

Weeks v. Snyder, 219 F.3d 245 (3d Cir. 2000) 6

Witherspoon v. Purkett, 210 F.3d 901 (8th Cir. 2000) 6

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONS

U.S. Const. amend. V 1, 4

U.S. Const. amend. VI 1, 5

U.S. Const. amend. XIV, § 1 1

RULES

Sup. Ct. R. 10 8

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The decision of the Supreme Court of Florida is reported at *Grosvenor v. State*, 874 So.2d 1176, *rehearing denied*, 2004 Fla. LEXIS 947 (Fla. Mar. 26, 2004). The Florida Supreme Court's opinion reversed *Grosvenor v. State*, 816 So.2d 822 (Fla. 5th DCA 2002). On remand, the Fifth District Court of Appeal issued mandate and denied the Petitioner's request for stay of mandate.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth Amendment to the United States Constitution, which provides in relevant part that "[n]o persons shall be . . . deprived of life, liberty, or property, without due process of law"; the Sixth Amendment to the United States Constitution, which provides in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence"; and the Fourteenth Amendment to the United States Constitution, which provides in Section I in relevant part that "nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

Respondent Traci Ann Grosvenor plead *nolo contendere* to first-degree murder and related charges and was sentenced to two life terms, two fifty-year terms, and one five-year term, all running concurrently. *Grosvenor v.*

State, 874 So.2d 1176, 1176-77 (2004). Grosvenor was represented by the Public Defender's Office of the Fifth Judicial Circuit, State of Florida. *Id.* Grosvenor told her attorneys that she had used drugs and alcohol on the day of the incident, a fact that was supported by a laboratory report from testing immediately following Grosvenor's arrest for the incident that resulted in her prosecution, which revealed traces of marijuana and cocaine in Grosvenor's system. Grosvenor's counsel did not advise her about the availability of a voluntary intoxication defense to all of the charges against her. *Id.* Grosvenor reluctantly agreed to her counsel's advice to plead *nolo contendere* to the charges against her, but only after she initially entered a guilty plea that the trial Court vacated *sua sponte* when Grosvenor told a newspaper reporter that she would have gone to trial if she had a "split hair's chance" of defense.

Following sentencing, Grosvenor filed a post-conviction motion seeking to vacate her guilty plea, alleging that "had [she] been informed of her viable defense of voluntary intoxication . . . she would not have entered the plea agreement and instead would have proceeded to trial." *Id.* The trial Court granted an evidentiary hearing on the issue of ineffective assistance of counsel. 874 So.2d at 1177. The Court agreed to assume for purposes of the initial hearing that trial counsel's performance was deficient and consider only whether Grosvenor suffered prejudice. *Id.* The deposition of Grosvenor's lead trial attorney stated that he (trial counsel) considered the voluntary intoxication defense, but, without consulting Grosvenor, "decided it was not a valid defense."

The record in Grosvenor's case is replete with evidence that Grosvenor resisted entering her pleas and unequivocally advised her counsel and the trial Court that

she wanted to proceed to trial. (R. IX-T52-53). There is no evidence that Grosvenor's trial counsel advised her about the strengths and weaknesses of the defense of voluntary intoxication so that she could make an informed choice whether to enter a plea or go to trial. Not only did Grosvenor's trial counsel fail to make a reasonable effort to discover her defenses, but counsel ignored Grosvenor when she specifically told counsel that if she had a defense she wanted to proceed to trial. This fact was not only presumed in the bifurcated procedure used in the post-conviction proceeding, but was also established without contradiction at the post-conviction hearing. (Grosvenor's Initial Brief to the Supreme Court of Florida, pp. 6-8, 10).

SUMMARY OF THE ARGUMENT

The Supreme Court of Florida held that Grosvenor, in order to successfully demonstrate ineffective assistance of counsel relating to her guilty plea, must demonstrate a reasonable probability that, but for counsel's errors, she would not have pleaded guilty and would have insisted on going to trial. *Grosvenor v. State*, 874 So.2d at 1177. This holding iterates the standard of this Court originally set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and reaffirmed in both *Hill v. Lockhart*, 474 U.S. 52, 59 (1985) ("[t]he defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial") and *Roe v. Flores-Ortega*, 528 U.S. 470, 486 (2000) (defendant need not demonstrate grounds for meritorious appeal or even "specify the points he would raise were his right to appeal reinstated").

The holding of the Supreme Court of Florida properly recognizes that the focus of the prejudice prong of *Strickland* is whether a defendant can show that it is reasonably probable that she would have insisted on going to trial based on the totality of the circumstances. This interpretation has been applied by state and federal courts since *Strickland* and *Hill*. For these reasons and reasons more fully explained below, the State of Florida's Petition for Writ of Certiorari should be denied.

ARGUMENT

The decision of the Supreme Court of Florida is in accord with this Court's clear and longstanding precedent. The seminal case of *Strickland v. Washington*, 466 U.S. at 688, imposes a "basic duty" upon counsel to consult with the client as to "important" matters. The Constitution guarantees that, when faced with critical decisions, a criminal defendant receive "the guiding hand of counsel." *Powell v. Alabama*, 287 U.S. 45, 69 (1932). This duty to consult applies to the "fundamental" decision whether to plea guilty or take a case to trial.[1] Without at least some

[1] This Court has recognized that there are four "fundamental decisions" that only the defendant, and not counsel, can make: (1) whether to plead guilty; (2) whether to waive a jury; (3) whether to testify; and (4) whether to take an appeal. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). These decisions are "fundamental" because they involve the waiver of "important" rights. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (a waiver is typically an "intentional relinquishment or abandonment of a known right or privilege"). The decision to plead guilty is a particularly important right as the decision to plead guilty involves a waiver of a panoply of trial rights. *Boykin v. Alabama*, 395 U.S. 238 (1969) (due process requires that the court closely question the

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level of consultation and explanation, the client's decision whether to plead guilty cannot be a meaningful one. An attorney who fails to discuss potential affirmative defenses with the client fails to fulfill his or her Sixth Amendment duty of effective representation.

In *Strickland*, this Court established the familiar two-pronged test for proving ineffective assistance of counsel: first, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment"; and second, that the defendant was prejudiced because counsel's errors rendered the outcome of the state court's proceedings unreliable. *Id.*, 466 U.S. at 687.

This Court has established that "prejudice" under *Strickland* requires only a showing of a reasonable probability that, but for counsel's deficient performance, the defendant would have taken his case to trial, *see Hill*, 474 U.S. at 59, or the defendant would have directed his lawyer to pursue an appeal, *see Flores-Ortega*, 528 U.S. at 482. In each instance, the legal standard turns on what the criminal defendant would have elected to do if competently counseled, and is designed to restore the defendant to the position he or she would have occupied if counsel had satisfied the Sixth Amendment. Attorney conduct that results in the denial of the client's fundamental right to a trial is constitutionally deficient.

Under *Strickland*, "prejudice" does not require the defendant to demonstrate that an affirmative defense would have been meritorious or successful. Any defendant

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defendant, on the record, to ensure that the waiver is a fully knowledgeable one).

denied the right to make an intelligent and informed waiver of the fundamental rights associated with a trial by jury has been prejudiced. Practically, a system whereby the trial Court was required to prejudge the likelihood of success of a defense without the assistance of the defense attorney would be unworkable. The *Hill* standard of "prejudice" properly focuses on the basic decision whether to plead guilty, rather than impractically forcing the trial Court to guess the ultimate outcome of the trial. The latter process would require the trial Court to identify meritorious issues that defendant could have asserted if afforded the assistance of counsel.

The federal Courts of Appeals have dealt squarely with this issue and held that "[i]t is not necessary for the defendant to show that he actually would have prevailed at trial." *Miller v. Champion*, 262 F.3d 1066, 1069 (10th Cir. 2001). Rather than simply relying on a defendant's "mere allegation" that he would have insisted on trial but for his counsel's errors, courts look to factual circumstances surrounding the plea to determine whether the defendant would have proceeded to trial. *Id.* at 1072. "While other circuits have considered the strength of the prosecution's case as circumstantial evidence of whether a petitioner would have changed his plea, and therefore whether he was prejudiced, none has held a petitioner must show that the case would likely have failed had it gone to trial." *Id.* at 1074; *see, e.g.*, *Weeks v. Snyder*, 219 F.3d 245, 259-60 (3d Cir. 2000) ("[i]n order to examine the prejudice issue, we must . . . determine whether there is a reasonable probability that if [the defendant] had been informed of the results of [trial counsel's] research, he would have insisted on going to trial"); *Witherspoon v. Purkett*, 210 F.3d 901, 903-04 (8th Cir. 2000) ("[w]e conclude

that there is not reasonable probability that [the defendant] would have continued to plead not guilty and would have insisted on going to trial" thus failing to make the necessary showing of prejudice); *Warner v. United States*, 975 F.2d 1207, 1214 (6th Cir. 1992) (defendant's testimony "that he would have pled not guilty and gone to trial but for the misadvice of his attorney" constituted prejudice); *Holmes v. United States*, 876 F.2d 1545, 1551 (11th Cir. 1989) (in order to satisfy the *Hill v. Lockhart* standard, defendant must prove that "he would not have pleaded guilty and would have insisted on going to trial had his attorney not misled him with faulty information"); *Iaea v. Sunn*, 800 F.2d 861, 865-66 (9th Cir. 1986) (where "[t]he record is replete with evidence that [defendant] was very reluctant to plead guilty and that [defendant's counsel and brother] had a great deal of trouble convincing him to do so," the Court found a sufficient showing of actual prejudice); *United States v. Giardino*, 797 F.2d 30, 32 (1st Cir. 1986) (sufficient prejudice shown where defendant "explicitly says he would have gone to trial had he known the truth about [a witness'] likely testimony").

Instead, the lower Courts usually consider the strength of the defendant's case only to the extent "it offers circumstantial evidence of what the petitioner would have done had his counsel not proved to be ineffective." *Miller*, 262 F.3d at 1074. The Court in *Miller* aptly held that, in light of the "overwhelming weight of authority among the other federal circuits" and this Court's opinion in *Hill*, "the district court erred by requiring [the defendant] to prove a reasonable probability existed not only that he would have insisted on trial but for his counsel's mistakes, but also that there was a likelihood that he would have prevailed at trial." *Id.*

Accordingly, the foregoing demonstrates that there is no compelling basis for this Court's exercise of jurisdiction by certiorari review under Rule 10 of the Rules of the Supreme Court of the United States, as the correct legal standard for the prejudice prong of *Strickland* has been applied uniformly by the lower Federal Courts and reiterated by the Supreme Court of Florida in *Grosvenor v. State*, 874 So.2d 1176, *rehearing denied*, 2004 Fla. LEXIS 947 (Fla. Mar. 26, 2004).

CONCLUSION

Respondent Traci Ann Grosvenor respectfully requests that this Court deny the State of Florida's Petition for Writ of Certiorari herein.

Respectfully submitted,

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Dated this 1st day of November, 2004